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Supreme Court of the United States.

OCTOBER TERM, 1956.

No. 501.

POLAROID CORPORATION,
Petitioner,
against
THE UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The majority opinion of the United States Court of Appeals for the First Circuit, as handed down on July 17, 1956, contained the following sentence:

> "We agree that Polaroid is not the manufacturer of the camera within the meaning of the statute for the reasons just quoted." (Appendix "A," p. 27.)

On October 11, 1956, after the Petition for Writ of Certiorari had been duly filed by Petitioner in this Court, the

Court of Appeals made an *ex parte* order correcting its opinion by deleting the word "not" from the foregoing sentence (Appendix "B"). Petitioner received notice of the correction on October 18, 1956.

In view of this material change, which completely reversed the meaning of the opinion of the Court below, necessitating substantial alteration in the Petition for Certiorari heretofore filed, Petitioner respectfully moves this Court for leave to file this Supplemental Petition for Writ of Certiorari.

Respectfully submitted,

DAVID SAPERSTEIN,
Attorney for Petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1956.

No. 501.

POLAROID CORPORATION,
Petitioner,

against

THE UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the First Circuit, entered July 17, 1956, affirming (Circuit Judge Woodbury dissenting) a judgment of the United States District Court for the District of Massachusetts entered February 26, 1956.

Report of Opinions.

The majority and dissenting opinions of the United States Court of Appeals for the First Circuit, as rendered on July 17, 1956, are annexed as Appendix "A" to this

petition, and are reported at 235 F. (2d) 276 (1956). The order dated October 11, 1956, of the United States Court of Appeals for the First Circuit correcting its opinion is annexed as Appendix "B" to this petition. The opinion of the United States District Court for the District of Massachusetts is reported at 138 F. Supp. 735 (1956), and is set forth in the record appendix (A148-A153).

Grounds of Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on July 17, 1956 (Appendix "C" to this Petition). Jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code.

Questions Presented.

(1) Is the owner of product patents on a camera, which purchases such camera made to its specifications from the manufacturer thereof pursuant to an arm's length sale contract, and acts as the distributor thereof to the public, the "manufacturer" within the intendment of Section 3406(a)(4) of the Internal Revenue Code of 1939, as amended?

(2) If the answer to (1) is in the negative, is the manufacturers' excise tax under Section 3406(a)(4) of the Internal Revenue Code of 1939, as amended, imposed, with respect to a patented camera, upon the sale of the camera by the manufacturer to the patent owner, or upon the subsequent sale thereof by the patent owner to the public?

Constitutional Provision, Statute and Regulations Involved.

This case involves the following constitutional provision, statute and regulations:

Article I, Section 2, of the Constitution of the United States;

Section 3406(a)(4) of the Internal Revenue Code of 1939, as amended; and

Sections 316.1(f), 316.4, 316.5(a)(b)(d) of Treasury Regulations 46 (1940) promulgated under the Internal Revenue Code.

The said constitutional provision, statute and regulations are set forth in Appendix "D."*

Statement of the Case.

Petitioner, Polaroid Corporation, instituted this action in the District Court for the District of Massachusetts to recover a manufacturers' excise tax paid by Petitioner upon the sale of a camera, pursuant to Section 3406(a)(4) of the Internal Revenue Code. The jurisdiction of the District Court was invoked under Sections 1340 and 1346 of Title 28 of the United States Code.

The complaint alleged that the camera was manufactured by Greist Manufacturing Company (hereinafter called "Greist"), an independent unaffiliated corporation, pursuant to a sales contract between Greist and Petitioner, and that Greist and not Petitioner was the "manufacturer or producer" of the camera within the intendment of Section 3406(a)(4) (A2-A6).

The action is a test case to determine whether the incidence of this tax is upon Petitioner or Greist. At the trial Greist intervened as party plaintiff and likewise contended that it and not Petitioner was the manufacturer or producer of the camera (A9-A12).

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*All references to statutory provisions are to the Internal Revenue Code of 1939, as amended, unless otherwise expressly specified.

The undisputed facts are succinctly summarized in the majority opinion of the Court below as follows:

> "The facts are undisputed. The Polaroid Highlander Camera was invented by the president of Polaroid, Dr. Edwin H. Land. Polaroid owns product patents on the camera and certain of the component parts, but has no patent covering any process or operation involved in making the camera.
>
> "Greist fabricates the camera pursuant to a contract purporting to be a sales agreement under which Greist agreed to sell and deliver to Polaroid, at a fixed price per delivered camera, 100,000 cameras to be produced by Greist in accordance with approved specifications.
>
> "Greist worked out all production techniques and independently of Polaroid established the unit price of the cameras.
>
> "All manufacturing operations involved in the production of the cameras are performed by Greist or its subcontractors. All materials and parts are purchased or produced by Greist. All labor and supervisory personnel are supplied by Greist. Polaroid advances no money or credit. The cameras are delivered by Greist in a finished and packaged condition. Polaroid furnishes only printed matter to be inserted in the package.
>
> "Greist has complete control of all manufacturing methods and production, subject only to Polaroid's right to make tests to determine whether the cameras meet specified standards.
>
> "All standard production tools are owned by Greist. Specialized tools are designed by Greist and purchased or fabricated at its own expense, but the contract provides that Polaroid shall purchase these tools over a period of time from Greist at cost.

"Greist maintains a supply of finished cameras from which shipments are made pursuant to Polaroid's instructions either to Polaroid in Cambridge or directly to Polaroid's consignees.

"The Polaroid trademark is affixed to the camera by Greist. Title to all cameras remains in Greist until they are segregated following Polaroid's approval of the six sample cameras taken from each day's production. Greist guarantees the camera and component parts against defects.

"The contract contains an escalator clause providing for changes in the unit price of the camera to reflect changes of 10¢ or more in Greist's manufacturing costs resulting from general changes in base wage rates or the competitive market price of materials." (Appendix "A," pp. 24-26.)

After trial, the District Court dismissed the complaint on the merits, stating in its opinion that "the case at bar may be close," but, by reason of Petitioner's ownership of patents on the camera, Petitioner was the manufacturer within the intendment of the taxing statute (A153).

The Court of Appeals for the First Circuit (Circuit Judge Woodbury dissenting and voting to reverse) affirmed the decision of the District Court. In its opinion, as corrected by the order of October 11, 1956, the majority of the Court of Appeals agreed with the District Court that, by reason of its ownership of the patents, Petitioner is the manufacturer of the camera within the meaning of the statute (Appendix "B," p. 30). The majority further held that the sale of the camera by Greist to Petitioner does not represent a "first sale" of the product under the rule of *Indian Motocycle Co.* v. *United States,* 283 U.S. 570, 574 (1931), and that Petitioner's subsequent

sale of the camera was subject to the tax as the "first sale" under such rule (Appendix "A," pp. 27-28). The stated basis for the majority's determination that the sale by Greist to Petitioner does not constitute the "first sale" under the statute is that the right to use or resell the cameras was vested in Petitioner prior to such sale by virtue of its patents and was not acquired "by virtue of any property rights conveyed to it by Greist" (Appendix "A," p. 28). Circuit Judge Woodbury, in dissenting, stated that Petitioner's ownership of the patents was of no relevance, that Greist was the manufacturer and Petitioner a purchaser who sold the cameras at wholesale, and that to impose the tax on Petitioner is to base the tax, not on the manufacturer's sale price in accordance with the statute, but on the wholesaler's sale price (Appendix "A," pp. 28-29).

Reasons for Granting the Writ.

I. This case presents an important question of Federal tax law which has not been, but should be, decided by this Court.

II. The decision below is in conflict with the principles enunciated by this Court in *Indian Motocycle Co.* v. *United States*, 283 U.S. 570 (1931), and is irreconcilable with the decision of the Court of Claims in *Hall-Scott Motor Car Co.* v. *United States*, 3 F. Supp. 818 (1933).

I.

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL TAX LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

This case involves a question of far-reaching importance in the field of manufacturers' excise taxes. It presents the

question of the incidence of such tax on a patented article manufactured and sold by the manufacturer to the patent owner pursuant to a contract of sale negotiated at arm's length.*

The decision below reaches anomalous results. It first holds Petitioner to be the "manufacturer" within the meaning of the taxing statute solely by reason of its ownership of product patents on the camera, notwithstanding that on the undisputed facts, as will hereinafter be demonstrated, Petitioner is not the manufacturer under the universally accepted definition of such term and under the applicable Treasury Regulations. Although this determination, if correct, would appear to be dispositive of the issue involved in this case, the decision below then holds, on the contrary premise that Greist and not Petitioner is the "manufacturer" within the meaning of the statute, that the sale of the cameras by Greist to Petitioner did not constitute a "sale" for the purpose of determining the incidence of the tax, notwithstanding that it was a sale under the universally accepted definition of such term and under the applicable Treasury Regulations.†

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*In *Hendy* v. *Soule*, 11 Fed. Cas. 1097, No. 6359 (D. Cal. 1868), *Warner-Patterson Co.* v. *United States*, 68 Ct. Cl. 237 (1929), *Charles Peckat Manufacturing Co.* v. *Jarecki*, 196 F. (2d) 849 (7 Cir. 1952); cert. den. 344 U.S. 875 (1952), and *Carbon Steel Co.* v. *Lewellyn*, 251 U.S. 501 (1920), the relationship created between the company manufacturing the product and the company ordering the product to be manufactured was that of agent and principal —a relationship not present in the instant case. (Compare Treas. Reg. 46 (1940), Sec. 316.5(d).)

†Section 316.1(f) of Treasury Regulations 46 (1940), pertaining to the excise tax in suit, defines the term "sale" to mean "an agreement whereby the seller transfers the property, (that is, the title or the substantial incidents of ownership) in goods to the buyer for a consideration called the price * * *" Section

The effect of the decision is to vitiate the principle, heretofore sanctioned by the law, that a distributor who, in an arm's length transaction, purchases from the manufacturer a product made to the distributor's specifications, is not the "manufacturer" within the meaning of the excise tax statute. The decision also renders invalid the doctrine, likewise heretofore sanctioned by the law, that, where the manufacturing function and the distributing function are performed, respectively, by independent, unrelated companies, the price at which the manufacturer sells the product to the distributor determines the excise tax liability.

So long as the decision below stands, the company exclusively performing the manufacturing operations under an arm's length sale contract with a distributor would be the "manufacturer" unless the distributor holds a patent on the product, in which event, on precisely the same facts, the distributor and not the manufacturer would become the "manufacturer." Moreover, an arm's length sale by the manufacturer to a distributor would be a "sale" for excise tax purposes, unless the distributor holds a patent on the product, in which event precisely the same transaction would not be a "sale."

A decision by this Court is essential on the question of whether Congress intended the tax to be imposed upon the sale of a product by the patentee, notwithstanding that it is not the manufacturer within the universally accepted definition of such word, and notwithstanding that it deals with the manufacturer at arm's length. The impact of the construction adopted by the Court below will be keenly

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316.5(a) provides that "the tax attaches when the title to the article sold passes from the manufacturer to a purchaser."

The Court below found that there was a transfer of title to the manufactured cameras from Greist to Petitioner (Appendix "A," p. 26).

felt by a multitude of small businesses which, having inadequate financial resources for large-scale manufacturing operations, dedicate their working capital to research activities and to the distribution of the products discovered and developed thereby. The enlarging number of issued patents resulting from industry's increased devotion of effort and money to scientific research suggests not only that the decision below will adversely affect many existing businesses, but that it will also have crescendo effect in the future.

Furthermore, the construction accorded the taxing statute by the Court below raises grave doubts as to its constitutionality. While the manufacturers' excise tax has properly been considered an indirect tax (*Indian Motocycle Co.* v. *United States,* 283 U.S. 570 (1931)), the decision below, by subjecting a patent owner to such tax solely by virtue of its patent ownership, has converted such tax into a direct tax. A sale of a patented product, taxed only by reason of the existence of the patent, is tantamount to a tax on the patent itself.

> Compare *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U.S. 429 (1895).

So construed, the manufacturers' excise tax involved in this case is a direct tax, violative of Article I, Section 2, of the Constitution of the United States.

* * *

The decision below effects an unreasonable discrimination against patent owners, to their competitive disadvantage.

In the case of an unpatented product it is established that the sale by the manufacturer to a distributor ordering such product manufactured pursuant to its specifications

is the one subject to the manufacturers' excise tax and not the subsequent sale by the distributor to the public, though the latter sale is made under the distributor's trade name and though the public knows only the distributor as the source of origin of the product.

Charles Marchand Co. v. *Higgins,* 124 F. (2d) 433 (2 Cir. 1942), affirming 36 F. Supp. 792 (S.D. N.Y. 1940).

T. L. Williams v. *Harrison,* 110 F. (2d) 989 (7 Cir., 1940).

United States v. *Gamble-Skogmo, Inc.,* 91 F. (2d) 372 (8 Cir., 1937).

The validity of this well-settled point of law was conceded by District Judge Aldrich in the instant case, who also acknowledged that the fact that the manufacturer sells the product to the distributor exclusively does not change the manufacturer's status or convert the distributor into the "manufacturer" for excise tax purposes (A151).

See Special Ruling (August 3, 1932), 322 CCH, pp. 2328-2329.

Thus, in the case of unpatented products, the tax is based on the manufacturer's sale price in accordance with the statute, and not on the distributor's higher sale price, which necessarily includes the distributor's mark-up for merchandising, selling, overhead and profit.

To tax a distributor, solely by reason of its ownership of product patents, on its sale price to the public, is to subject it to a tax base to which distributors of competitive unpatented products are not subject. Moreover, the difference between such tax and the tax computed upon the

manufacturer's sale price is sufficiently large to affect the distributor's pricing policies, to require an increase in the price of the patented product to the consumer, and hence to curtail the demand for the distributor's product.

* * *

In holding that Petitioner is the "manufacturer" within the meaning of Section 3406(a)(4), the majority of the Court below ignored the well-established principle of construction that words employed in a taxing statute are to be accorded their literal or usual meaning and cannot be extended by implication beyond their clear import.

> *Helvering* v. *William Flaccus Oak Leather Co.*, 313 U.S. 247, 249 (1941).
> *Gould* v. *Gould*, 245 U.S. 151, 153 (1917).

Webster's New International Dictionary (2d Ed.) defines the words "manufacture" and "manufacturer" as follows:

> "*manufacture*, * * * 1. To make (wares or other products) by hand, by machinery, or by other agency; as, to *manufacture* cloth, nails, glass, etc.; to produce by labor, esp., now, according to an organized plan and with division of labor, and usually with machinery."
> "*manufacturer*, * * * One who manufactures; * * * An employer of operatives in manufacturing; the owner of a manufactory."

"Manufacturer" is defined in the Treasury Regulations covering the excise tax in suit in the following manner:*

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*The words "manufacturer" and "producer," as used in the taxing statute, are synonymous. *Charles Marchand Co.* v. *Higgins*, 36 F. Supp. 792, 795 (S.D. N.Y. 1940); aff'd 124 F. (2d) 433 (2 Cir. 1942). *Allen* v. *Smith*, 173 U.S. 389, 399 (1899).

"Who is a manufacturer—(a) The term 'manufacturer' includes a person who produces a taxable article from scrap, salvage, or junk material, as well as from new or raw material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles.

"(b) Under certain circumstances, as where a person manufactures or produces a taxable article for a person who furnishes materials and retains title thereto, the person for whom the taxable article is manufactured or produced, and not the person who actually manufactures or produces it, will be considered the manufacturer." (Treasury Regulations 46 (1940), Section 316.4(a)(b).)

In *Charles Marchand Co.* v. *Higgins,* 36 F. Supp. 792, 795 (S.D. N.Y. 1940); aff'd 124 F. (2d) 433 (2 Cir. 1942), the Court said:

"It has been held that *manufacture* means the creation or production of a product from raw materials or by *combining* two or more products to form a *new* and *different* one." (36 F. Supp. 792, at 795; italics the Court's.)

Cf. *Anheuser-Busch Brewing Association* v. *United States,* 207 U.S. 556, 562 (1908).
Hartranft v. *Wiegmann,* 121 U.S. 609 (1887).

The undisputed facts, as summarized in the majority opinion of the Court below, make pellucid that within the intendment of the above definitions Greist and not Petitioner is the manufacturer of the camera (Appendix "A," pp. 25-26). It is Greist which "makes" the camera by the "production of a product from raw materials" or by "processing, manipulating or changing the form of an

article" or by "combining or assembling two or more articles." Conversely, Petitioner does none of these things. Nor does Petitioner "furnish materials and retain title thereto," a criterion for determining the manufacturer under the Treasury Regulations' definition.

The decision below that Petitioner is the manufacturer within the intendment of the taxing statute was not predicated on any affirmative act of Petitioner in the making of the camera but on Petitioner's ownership of the patents—a fact, we submit, relating only to the conception and design of the article to be manufactured, and not to its manufacture. The rationale of such decision, as expressed by the District Court and concurred in by the majority of the Court below, is that, by virtue of Petitioner's patent position, Petitioner "not only agrees to buy Greist's entire output, but it dictates the amount of that output. If Polaroid's orders do not use up Greist's capacity, Greist is not free to sell elsewhere" (A152; Appendix "A," p. 26).*

That Greist, by reason of Petitioner's patent position, is not free to sell the cameras elsewhere is conceded. But the conclusion that such fact means that Greist is not the manufacturer of the cameras which by contract it has agreed

*The majority opinion of the Court below also quoted with approval District Judge Aldrich's statement that, by reason of the escalator clause, "If various costs go up, the risk is Polaroid's. If Greist manages to cut them, the gain is Polaroid's" (A152; Appendix "A," p. 26). In so stating, Judge Aldrich misunderstood the effect of the escalator clause, which is in conventional form (A123-A124). Should the price stated in the contract not produce a profit, all risk of loss is upon Greist alone (A57). The escalator clause simply covers certain changes in the costs of factory labor and of parts and materials during the long term of the contract. It does not alter the sale character of the contract or make Petitioner the manufacturer.

Similarly, Petitioner's agreement to repay Greist for the cost of the specialized tools does not make Petitioner the manufacturer. See Rev. Rule 54-414; I.R.B. 1954-39.19.

to manufacture and sell to Petitioner is a *non sequitur*. Greist is the manufacturer of such cameras because, as the company which makes them, it alone fits the definition of the word "manufacturer" as an ordinary word in the English language and as defined in the applicable Treasury Regulations. Greist as the maker of such cameras is still their manufacturer, notwithstanding that a limitation may exist on its right to manufacture and sell additional quantities of the cameras to others under other contracts.

Moreover, District Judge Aldrich's assumption, quoted with approval in the majority opinion below, that "if Greist were the ordinary, uncontrolled manufacturer it would have to pay royalties to Polaroid" (A152; Appendix "A," p. 26) is erroneous. Petitioner's patents are product patents only. None of Greist's manufacturing operations is covered under any patent the use of which would require a license for which Petitioner would have a right to charge a royalty. In fixing the sales price in the instant contract, Greist took into account all components of cost and profit (A35). Its price to Petitioner was no less because Petitioner owned product patents on the camera.

We respectfully submit that under the ordinary meaning of "manufacturer," which is the meaning to be accorded to such word as used in the taxing statute, Greist, and not Petitioner, is the manufacturer of the camera. In interjecting patent ownership into such meaning and in holding that Petitioner is the manufacturer because it owns the patents on the camera, the Court below has rejected the ordinary meaning of the word and has extended its meaning by implication beyond its clear import, in violation of the well-established principle of construction hereinabove stated.

In this connection the following comment of the Court of Appeals for the Seventh Circuit in the *T. L. Williams*

case, *supra,* with respect to the effect of the distributor's use of a tradename on the incidence of a manufacturers' excise tax, is just as pertinent and persuasive with respect to patents.

> "Defendant also presses the point that by the use of the tradename 'Maybelline' plaintiff greatly enhanced both the volume and the selling price of the taxable article. We do not doubt that this is a correct statement, but the statute does not impose a tax upon the use of a tradename or the increase in price or volume which results from its use, unless the use thereof is by the manufacturer of the taxable product * * *." (110 F. (2d) at p. 994.)

Similarly, Section 3406(a)(4) does not impose a tax upon the ownership of patents by Petitioner, the inventor and the distributor, but not the manufacturer of the cameras.

* * *

The consideration by the Court below of the question whether the sale by Greist to Petitioner constituted a "sale" within the meaning of Section 3406(a)(4) is based on the premise that Greist and not Petitioner is the "manufacturer" of the camera under such statute (Appendix "A," pp. 27-28). Otherwise such inquiry would have had no pertinency, since the statute taxes only a sale *by* the manufacturer and not one *to* the manufacturer.

In holding that the sale of the camera by the manufacturer (Greist) to the patent owner (Petitioner) does not constitute a "first sale" under the *Indian Motocycle Co.* rule (*Indian Motocycle Co.* v. *United States,* 283 U.S. 570 (1931)), because the right to use or resell was vested in the patent owner prior to such sale, the Court below failed to distinguish between property rights in the physical article

which is the fruit of the discovery and the rights in such discovery accorded by the patent.

Belknap v. *Schild,* 161 U.S. 10, 24 (1896).
Patterson v. *Kentucky,* 97 U.S. 501, 506 (1879).

Greist owned all property rights in the cameras prior to the time when title thereto passed to Petitioner. Petitioner derived no title or interest in the cameras from its ownership of patents, other than the right to exclude unlicensed persons from making, using or vending the product.

Bloomer v. *McQuewan,* 14 How. 539, 549 (1852).
Special Equipment Co. v. *Coe,* 324 U.S. 370, 378 (1945).

Even as against an infringer Petitioner would have no title or interest in the infringing article.

Belknap v. *Schild,* 161 U.S. 10, 24 (1896).
Dickerson v. *Sheldon,* 98 Fed. 621 (2 Cir., 1899).

It is the sale by Greist to Petitioner which vested in Petitioner the title to the cameras and all incidents of ownership which attach to title, including the right to use and resell the cameras.

Moreover, the opinion of the Court below misapplies the "first sale" rule of the *Indian Motocycle Co.* case. By taking out of context a sentence from the Court's opinion in that case* the majority of the Court below mistakenly construed such rule to justify the imposition of a manufacturers' excise tax upon a sale not made by the manu-

*"Counsel for the government base their contention on the requirement that the tax be paid by 'the manufacturer, producer or importer'; but we think this requirement is intended to be no more than a comprehensive and convenient mode of reaching all first or initial sales, and that it does not reflect a purpose to base the tax in any way on manufacture, production or importation." (283 U.S. at p. 574.) (See Appendix "A," p. 27.)

facturer. There is no basis in the opinion of this Court in the *Indian Motocycle Co.* case for the conclusion that a sale by anyone other than the manufacturer is subject to the excise tax.

* * *

In the interest of a clarification as to the incidence of the manufacturers' excise taxes with respect to patented products, a decision by this Court is necessary on the question of whether such tax is imposed upon the sale of a taxable product by the patentee who purchases the product from the manufacturer and acts solely as the distributor thereof.

Such a decision would implement the Congressional intent that certainty as to liability for, and the amount of, the manufacturers' excise tax is a prime requisite.*

II.

THE DECISION BELOW IS IN CONFLICT WITH THE PRINCIPLES ENUNCIATED BY THIS COURT IN INDIAN MOTOCYCLE CO. v. UNITED STATES, 283 U.S. 570 (1931), AND IS IRRECONCILABLE WITH THE DECISION OF THE COURT OF CLAIMS IN HALL-SCOTT MOTOR CAR CO. v. UNITED STATES, 3 F. SUPP. 818 (1933).

Conflict with Indian Motocycle Co. v. United States.

The decision of the Court below cannot be reconciled with the principles enunciated by this Court in *Indian Motocycle Co.* v. *United States*, 283 U.S. 570 (1931).

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*In the Ways and Means Committee Report on the Revenue Act of 1932, it was stated: "It is essential that the persons who will be called upon to make returns and pay the tax to the Government must know, in advance of the sale, whether the sale is taxable and the amount of tax liability. Having ascertained the taxability of the sale and the basis upon which the amount of tax is to be computed, they must be able to rely upon the determination." (H.R. Report No. 708, 72d Cong., 1st Sess., 1939-1 (Part 2), Internal Revenue Bulletin 457, 479.)

In that case this Court stated, with respect to the incidence of a manufacturers' excise tax under the Internal Revenue Code:

> "We think it is laid on the sale, and on that alone. It is levied as of the time of sale and is measured according to the price obtained by the sale. It is not laid on all sales, but only on first or initial sales—those by the manufacturer, producer or importer. Subsequent sales, as where purchasers at first sales resell, are not taxed." (283 U.S. at p. 574.)

These principles are irreconcilable with the decision of the Court below that the sale by Greist to Petitioner was not the sale subject to the tax.

Conflict with Hall-Scott Motor Car Co. v. United States.

The decision below conflicts, in principle, with the decision of the Court of Claims in *Hall-Scott Motor Car Co.* v. *United States,* 3 F. Supp. 818 (1933).

There the plaintiff entered into an agreement with the Ruckstell Company, the owner of patents on an automobile axle known as the "Ruckstell Axle," whereby the plaintiff was to manufacture Ruckstell Axles and sell them to the Ruckstell Company at a fixed price. A subsequent agreement between the parties, under which the plaintiff was to act as the exclusive distributor of the axles in a designated territory, provided that the plaintiff would purchase the axles from the Ruckstell Company at a higher stated price and sell them to dealers in the territory at the dealers' price.

The plaintiff contended that the manufacturers' excise tax under Section 900 of the Revenue Act of 1921 and Sec-

tion 600 of the Revenue Act of 1924 upon the axles sold by it in its exclusive territory must be computed upon the price for which the plaintiff sold the axles to the Ruckstell Company, and that the tax computed upon the excess over such price should be refunded to it. The defendant contended that the contract arrangement between the plaintiff and the Ruckstell Company provided merely for a division of the price for which the plaintiff sold the axles to the public, and that the tax was properly computed and collected by the defendant upon the price at which the axles were sold by the plaintiff to the public.

The Court of Claims held that the manufacturers' excise tax under the aforementioned statutes was imposed upon the sale by the plaintiff (the manufacturer) to the Ruckstell Company (the patent owner),* and granted the plaintiff a refund to the extent that the tax had been computed upon a base in excess of the price obtained in such sale. The Court stated at page 833:

> "There were three separate and distinct transactions: (1) A sale by plaintiff to the Ruckstell Company at a certain price; (2) a sale by the Ruckstell Company at a greater price; and (3) a sale by plaintiff to dealers in the eastern territory at dealers' prices.
>
> * * * * * * *
>
> "Section 900 of the Revenue Act of 1921 and section 600 of the Revenue Act of 1924 imposed the tax upon

*In the *Hall-Scott Motor Car Co.* case the patent owner was found not to be the manufacturer of the taxable article. There the following special finding of fact was made:

> "During 1924, 1925 and 1926 the Bureau of Internal Revenue had under consideration the question whether the plaintiff or the Ruckstell Company was the manufacturer of Ruckstell axles and liable for the tax thereon, and finally determined that plaintiff was the manufacturer and was liable for the tax." (3 F. Supp. at p. 825.)

the sale by the manufacturer, and article 3 of Regs. 47 provides that 'the tax is imposed on the sale by the manufacturer, and should be returned and paid by him whether the sales price is actually collected or not.' In view of the express provisions of the statute and the regulations, we are of opinion that the sale in the transactions involving axles sold in the eastern territory, which was the subject of the tax, was a sale by the manufacturer, and that sale occurred when plaintiff sold the axles to the Ruckstell Company."

The decision of the Court of Claims in the *Hall-Scott Motor Car Co.* case that the manufacturers' excise tax is imposed upon the sale by the manufacturer to the patent owner squarely conflicts with the determination of the Court below that the sale by the manufacturer (Greist) to the patent owner (Petitioner) is not the one subject to tax under Section 3406(a)(4).

Conclusion.

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the First Circuit to review its judgment.

Respectfully submitted,
DAVID SAPERSTEIN,
Attorney for Petitioner.

Of Counsel:
JULIUS SILVER,
ISAAC M. BARNETT,
HARRY P. GOLDSTEIN.

Appendix "A."

Opinions of the Court Below.

The following is the full text of the majority and dissenting opinions of the Court of Appeals for the First Circuit in the instant case as rendered on July 17, 1956.*

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5102.

POLAROID CORPORATION,
PLAINTIFF, APPELLANT,

v.

THE UNITED STATES OF AMERICA,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Isaac M. Barnett, with whom *Julius Silver*, *Harry P. Goldstein* and *Silver, Saperstein & Barnett* were on brief, for appellant.

David O. Walter, Attorney, with whom *Charles K. Rice*, Assistant Attorney General, *Lee A. Jackson* and *Hilbert P. Zarky*, Attorneys,

*By order of the Court of Appeals for the First Circuit dated October 11, 1956, the majority opinion was corrected in the respect hereinafter noted. (See Appendix "B.")

Anthony Julian, United States Attorney, and *Arthur I. Weinberg*, Assistant U. S. Attorney, were on brief, for appellee.

OPINION OF THE COURT.

July 17, 1956.

HARTIGAN, *Circuit Judge*. This is an appeal from a judgment entered February 28, 1956, in the United States District Court for the District of Massachusetts, dismissing the complaint following a trial without jury upon the merits.

The action was brought under 28 U.S.C. §§ 1340 and 1346 to recover an excise tax of $4.24 paid by Polaroid Corporation, a Delaware corporation having its principal place of business in Massachusetts, upon the sale of a camera, pursuant to § 3406(a)(4) of the Internal Revenue Code of 1939, which provides in part:

> "§ 3406. *Excise taxes imposed by the Revenue Act of 1941*
>
> "(a) *Imposition.* There shall be imposed on the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to the rate on the price for which sold, set forth in the following paragraphs (including in each case parts or accessories of such articles sold on or in connection therewith, or with the sale thereof):
>
> * * *
>
> "(4) *Photographic apparatus.* Cameras * * *, 10 per centum.
>
> * * *."

This is a test case to determine whether the incidence of this tax is upon Polaroid or upon Greist Manufacturing Company, a Connecticut corporation having its principal place of business in Connecticut, which was permitted by the judge below to intervene.

The facts are undisputed. The Polaroid Highlander Camera was invented by the president of Polaroid, Dr. Edwin H. Land. Polaroid owns product patents on the camera and certain of the component parts, but has no patent covering any process or operation involved in making the camera.

Greist fabricates the camera pursuant to a contract purporting to be a sales agreement under which Greist agreed to sell and deliver to Polaroid, at a fixed price per delivered camera, 100,000 cameras to be produced by Greist in accordance with approved specifications.

Greist worked out all production techniques and independently of Polaroid established the unit price of the cameras.

All manufacturing operations involved in the production of the cameras are performed by Greist or its subcontractors. All materials and parts are purchased or produced by Greist. All labor and supervisory personnel are supplied by Greist. Polaroid advances no money or credit. The cameras are delivered by Greist in a finished and packaged condition. Polaroid furnishes only printed matter to be inserted in the package.

Greist has complete control of all manufacturing methods and production, subject only to Polaroid's right to make tests to determine whether the cameras meet specified standards.

All standard production tools are owned by Greist. Specialized tools are designed by Greist and purchased or fabricated at its own expense, but the contract provides that Polaroid shall purchase these tools over a period of time from Greist at cost.

Greist maintains a supply of finished cameras from which shipments are made pursuant to Polaroid's instructions either to Polaroid in Cambridge or directly to Polaroid's consignees.

The Polaroid trademark is affixed to the camera by Greist. Title to all cameras remains in Greist until they are segregated following Polaroid's approval of the six sample cameras taken from each day's production. Greist guarantees the camera and component parts against defects.

The contract contains an escalator clause providing for changes in the unit price of the camera to reflect changes of 10¢ or more in Greist's manufacturing costs resulting from general changes in base wage rates or the competitive market price of materials.

In his opinion the trial judge said:

> "* * * Polaroid not only agrees to buy Greist's entire output, but it dictates the amount of that output. If Polaroid's orders do not use up Greist's capacity, Greist is not free to sell elsewhere. If various costs go up, the risk is Polaroid's. If Greist manages to cut them, the gain is Polaroid's. The specialized tools are Polaroid's. The product patents, without which Greist could not operate, are retained by Polaroid, except for an implied license, for Polaroid's own benefit. Polaroid may terminate without cause, and Greist can never make another camera. In many important ways, therefore, Polaroid retains the dominant hand.
>
> "The patents seem to me of particular significance. If Greist were the ordinary uncontrolled manufacturer it would have to pay royalties to Polaroid, which, in turn, would be reflected in the sales price upon which the tax would be computed. Plaintiff's counsel made it plain in his opening that it was his contention, and would be Greist's, for whose tax, if any, the contract made Polaroid responsible, that the tax should be Greist's on the basis of Greist's cash price to Polaroid. This disregards the fact that Polaroid was supplying

a necessary and valuable component of any sale, a license under the patents. This absence of royalties is an abnormal situation. I think Polaroid is trying to eat its cake and have it."

The trial judge went on to say:

"* * * Obviously there is bound to be a difficult border line as to when, in the concept of this act, one is a manufacturer or only a buyer. The case at bar may be close. It is my opinion, however, that the balance favors the government. * * *"

We agree that Polaroid is not the manufacturer of the camera within the meaning of the statute for the reasons just quoted.*

We believe further that the sale, so-called, of the cameras by Greist to Polaroid does not represent a "first sale" of the product under the rule of *Indian Motocycle Co.* v. *U. S.*, 283 U.S. 570, 574 (1931) where the Court said:

"* * * It is not laid on all sales, but only on first or initial sales—those by the manufacturer, producer or importer. Subsequent sales, as where purchasers at first sales resell, are not taxed. Counsel for the Government base their contention on the requirement that the tax be paid by 'the manufacturer, producer or importer'; but we think this requirement is intended to be no more than a comprehensive and convenient mode of reaching all first or initial sales * * *."

Even assuming that the relationship between the parties was that of buyer and seller rather than principal and agent, the "sale" of these cameras transferred to Polaroid only the bare right to possession of the physical materials.

---

*This sentence was corrected by order of the Court of Appeals for the First Circuit, dated October 11, 1956, to read as follows:

"We agree that Polaroid is the manufacturer of the camera within the meaning of the statute for the reasons just quoted." (Appendix "B.")

Greist did not transfer to Polaroid the right to use these cameras or the right to resell them, since it could convey no more than it had of the various incidents of ownership. It is true, of course, that Polaroid could use or resell the cameras but this was made possible only by rights previously vested in Polaroid and *not by virtue of any property rights conveyed to it by Greist.*

We believe that a "sale" which conveys no right to use or resell the product, but only a bare right to possession, is not a sale within the meaning of § 3406(a)(4).

The judgment of the district court is affirmed.

WOODBURY, *Circuit Judge,* (dissenting). This is indeed a close case. Nevertheless the fact remains that Polaroid fabricated no part of the completed cameras, nor is there any basis for saying that the cameras were made by Greist either as Polaroid's agent, or as Polaroid's alter ego. Greist did not manufacture only Polaroid's cameras but in addition manufactured a variety of mechanical "precision assemblies," principally for sewing machines, for other purchasers. Neither were the cameras fabricated by Greist from any parts or materials furnished by Polaroid to which it retained title which would bring this case within the provisions of subsection (b) of Treasury Regulations 46 (1940) § 316.4 which in its entirety reads:

> "Who is a manufacturer—(a) The term 'manufacturer' includes a person who produces a taxable article from scrap, salvage, or junk material, as well as from new or raw material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles.
>
> "(b) Under certain circumstances, as where a person manufactures or produces a taxable article for a person who furnishes materials and retains title thereto, the person for whom the taxable article is manu-

factured or produced, and not the person who actually manufactures or produces it, will be considered the manufacturer."

Polaroid and Greist are wholly separate and distinct entities who struck an arm's length bargain whereby Greist as an independent contractor "manufactured" the cameras in the sense of making them, fabricating them, putting them together, with its own employees out of its own materials, and parts it purchased from third parties, and then sold them for an agreed price to Polaroid. The fact that because of Polaroid's patents Greist had and legally could have only one customer for the cameras and the fact that the cameras were made according to Polaroid's specifications and subject to its inspection seem to me beside the point. Certainly if Greist in violation of the patent law and its contract with Polaroid sold a camera or cameras to some one other than Polaroid it would be liable for the tax on those cameras.

It seems to me that in ordinary language Greist was the manufacturer and Polaroid a purchaser who sold the cameras at wholesale. Thus to impose the tax on Polaroid is to base the tax not on the manufacturer's sale price in accordance with the statute but on the wholesaler's sale price, which naturally is greater since it includes, presumably, in addition to the cost of the goods to the wholesaler (the price for which the manufacturer sold them) the wholesaler's mark-up for handling costs, selling, overhead and profit. I would reverse.

Appendix "B."

Order of Court of Appeals Correcting Opinion.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5102.

POLAROID CORPORATION,
Plaintiff, Appellant,

v.

UNITED STATES OF AMERICA,
Defendant, Appellee.

ORDER OF COURT

October 11, 1956.

It is ordered that the last full paragraph on page 4 of the opinion of this Court be corrected by striking therefrom the word "not" so that said paragraph will read: "We agree that Polaroid is the manufacturer of the camera within the meaning of the statute for the reasons just quoted."

By the Court:
/s/ ROGER A. STINCHFIELD
Clerk.

Appendix "C."

Judgment of the Court Below.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

No. 5102.

POLAROID CORPORATION,
Plaintiff, Appellant,

v.

UNITED STATES OF AMERICA,
Defendant, Appellee.

JUDGMENT

July 17, 1956.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk.

Appendix "D."

Constitutional Provision, Statute and Regulations Involved.

Constitution of the United States, Article I, Section 2, third paragraph:

> "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. * * *"

Internal Revenue Code of 1939, as amended:

> "§3406. Excise taxes imposed by the Revenue Act of 1941—(a) Imposition.
>
> "There shall be imposed on the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to the rate, on the price for which sold, set forth in the following paragraphs (including in each case parts or accessories of such articles sold on or in connection therewith, or with the sale thereof):
>
> * * * * * * *
>
> "(4) Photographic apparatus. Cameras * * * 10 per centum."

Treasury Regulations 46, Section 316.1(f):

> "(f) The term 'sale' means an agreement whereby the seller transfers the property (that is, the title or

the substantial incidents of ownership) in goods to the buyer for a consideration called the price, which may consist of money, services, or other goods."

Treasury Regulations 46, Section 316.4:

"Who is a manufacturer—(a) The term 'manufacturer' includes a person who produces a taxable article from scrap, salvage, or junk material, as well as from new or raw material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles.

"(b) Under certain circumstances, as where a person manufactures or produces a taxable article for a person who furnishes materials and retains title thereto, the person for whom the taxable article is manufactured or produced, and not the person who actually manufactures or produces it, will be considered the manufacturer.

"(c) A manufacturer who sells a taxable article in a knockdown condition, but complete as to all component parts, is liable for the tax, and not the person who buys, and assembles a taxable article from, such component parts."

Treasury Regulations 46, Section 316.5:

"When tax attaches—(a) In general the tax attaches when the title to the article sold passes from the manufacturer to a purchaser.

"(b) When title passes is dependent upon the intention of the parties as gathered from the contract of sale, and the attendant circumstances. In the absence of expressed intention, the legal rules of presumption

followed in the jurisdiction where the sale is made govern in determining when title passes. Generally, title passes upon delivery of the article to the purchaser or to a carrier for the purchaser.

"(c) * * *

"(d) Where a manufacturer consigns articles to a dealer, retaining ownership in them until they are disposed of by the dealer, title does not pass and the tax does not attach until sale by the dealer. Likewise, where the relationship between a manufacturer and a dealer is that of principal and agent, title passes upon sale by the dealer, and tax thereupon attaches.

"(e) * * *"

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 501

POLAROID CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT AND ON MOTION FOR LEAVE TO FILE SUPPLEMENTAL PETITION AND ON SUPPLEMENTAL PETITION

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. A148–A153) is reported at 138 F. Supp. 735. The opinion of the Court of Appeals (Supp. Pet. 23–29) is reported at 235 F. 2d 276.

JURISDICTION

The judgment of the Court of Appeals (Pet. 23) was entered on July 17, 1956. The original petition for a writ of certiorari was filed on October 11, 1956. On October 11, 1956, the Court of Appeals ordered

that its opinion be corrected. A motion for leave to file a supplemental petition and a supplemental petition for writ of certiorari were filed on November 1, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether Section 3406 of the Internal Revenue Code of 1939, imposing an excise tax on certain articles sold by the manufacturer, is applicable to sales by a patent owner of a device fabricated for it by another or to the transaction between the fabricator and the patent owner.

STATUTE AND REGULATIONS INVOLVED

The relevant portions of the Internal Revenue Code of 1939, as amended, and of Treasury Regulations 46 are as follows:

> Internal Revenue Code of 1939:
>
> SEC. 3406 [As added by Sec. 551, Revenue Act of 1941, c. 412, 55 Stat. 687]. EXCISE TAXES IMPOSED BY THE REVENUE ACT OF 1941.
>
> (a) *Imposition.*—There shall be imposed on the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to the rate, on the price for which sold, set forth in the following paragraphs (including in each case parts or accessories of such articles sold on or in connection therewith, or with the sale thereof):
>
> * * * * * *
>
> (4) [As amended by Sec. 486 (a), Revenue Act of 1951, c. 521, 65 Stat. 452; Act of May

21, 1952, c. 319, 66 Stat. 86, and Sec. 301 (b), Excise Tax Reduction Act of 1954, c. 126, 68 Stat. 37] *Photographic apparatus.*—Cameras and camera lenses, and unexposed photographic film in rolls (including motion picture film), 10 per centum. * * *

(26 U. S. C. 3406.)

Treasury Regulations 46 (1940 ed.):

SEC. 316.1 *Meaning of Terms.*—As used in these regulations—

(a) The terms defined in the applicable provisions of law shall have the meanings so assigned to them.

(b) The term "manufacturer" includes "producer" and "importer." (See also section 316.4.)

* * * * *

SEC. 316.4 *Who Is a Manufacturer.*—The term "manufacturer" includes a person who produces a taxable article from scrap, salvage, or junk material, as well as from new or raw material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles.

Under certain circumstances, as where a person manufactures or produces a taxable article for a person who furnishes materials and retains title thereto, the person for whom the taxable article is manufactured or produced, and not the person who actually manufactures or produces it, will be considered the manufacturer.

A manufacturer who sells a taxable article in a knockdown condition, but complete as to all component parts, is liable for the tax, and

not the person who buys, and assembles a taxable article from, such component parts.

STATEMENT

The taxpayer is the owner of patents upon a camera known as the Polaroid Highlander. The taxpayer is the sole merchandiser of this camera. It had no facilities, plant or personnel for making the camera in large quantities, and accordingly negotiated a contract with Greist Manufacturing Company to make the camera. Greist is a large manufacturer of mechanical precision assemblies, principally for sewing machines. Under the Polaroid contract it makes about one-half of the parts, subcontracts or purchases the rest, assembles the complete unit, and packages it for delivery, at an agreed rate per camera. Polaroid supplies literature to go in the box. (R. A149–A150.)

The agreement, dated January 6, 1953, may be summarized as follows (R. A123–A148):

It is in terms an offer by Greist to sell to the taxpayer 100,000 Polaroid-Land cameras, Model No. 28, to be manufactured in accordance with "Approved Specifications" (R. A123), accepted by the taxpayer (R. A148). The unit price is $19.28, to be increased or decreased as there may be a change in Greist's base wage rates or in the cost to Greist of parts, materials and/or supplies by reason of a change in the competitive market price to Greist of such items. (R. A123–A124, A147–A148.)

Delivery schedules were to be set up for from 5,000 to 10,000 cameras per month (R. A124–A125); after

approval of samples of each day's production, that day's lot was to be "delivered" to the taxpayer at Greist's plant, and Greist was to ship the cameras in accordance with shipping instructions from the taxpayer (R. A125).

The taxpayer agreed to purchase from Greist any specialized tools needed for the production of the cameras, by paying an addition of $3.89 to the unit price of the camera, and in any event paying the entire cost within two years. (R. A129–A132.)

The taxpayer had the right to inspect and test materials, parts, subassemblies, assemblies and workmanship with respect to cameras, to satisfy itself that they were being manufactured in accordance with the specifications, but had no power to control or supervise the methods of manufacture. (R. A132.)

The taxpayer could authorize the purchase of parts, materials, and supplies in advance of orders for additional cameras, the taxpayer being obligated to reimburse Greist for its direct costs, for overhead and administrative costs and profit, in the event that authorization was not followed by an order for cameras. (R. A133–A134.)

Paragraph VIII (A) provided as follows (R. A134):

> No license, express or implied, shall be deemed granted hereunder by you to us under any inventions, patents, patent rights or licenses now or hereafter owned by you, except such implied license, under any patents or patent rights now or hereafter owned by you, as shall be necessary to the delivery by us to

> you of the cameras provided for in this agreement, and/or as shall be necessary to the repair thereof.

The taxpayer agreed to defend any patent infringement suit or hold Greist harmless, except as to the processes of manufacture. Improvements and know-how relating to the design, functioning and production of the cameras were to be disclosed to the taxpayer by Greist, and the taxpayer had a right to a license or assignment of improvement patents obtained by Greist's employees, limited to the field of photography. (R. A134–A136.)

The agreement could be cancelled by either party at any time. (R. A136.) If the taxpayer cancelled for Greist's default, Greist was entitled to payment of the unit price for then completed cameras, and to reimbursement of its costs for materials, supplies, and partially completed cameras. (R. A139–A141.) If Greist was not in default, Greist was also entitled to receive 10% above its direct costs for parts and materials, a percentage of its costs for unfinished cameras for administrative costs and profit, and the sum of $1.50 for each undelivered camera called for by the basic 100,000 order, production of which was prevented by cancellation. (R. A136–A139.)

Paragraph XIII provided that in the event of any redetermination by the Federal Government of excise taxes in respect to the cameras, the taxpayer should be entitled to any refund and would reimburse Greist for any additional taxes paid by Greist. (R. A145.)

The contract was carried out. (R. A33, A39–A40.) Greist fabricated cameras only for the taxpayer (R. A55, A62), and could not and did not sell the cameras to the general public (R. A53, A100, A113). The cameras as made were shipped either to the taxpayer's warehouse in Cambridge (R. A110) or, on shipping instructions from the taxpayer, directly to the taxpayer's customers (R. A113–A114). They bore the Polaroid trade-name and trade-mark (R. A88, A100), in which Greist had no rights (R. A100).

The action here involved was instituted by the taxpayer in the United States District Court for the District of Massachusetts to recover a manufacturer's excise tax of $4.24 paid upon the sale of a camera. The District Court denied the recovery, holding that Polaroid was the "manufacturer" of the cameras, and taxable on their sale under Section 3406 of the Internal Revenue Code of 1939. (R. A148–A153.) It stressed the facts that Polaroid not only agreed to buy Greist's entire output, but that it dictated the amount of that output; that Greist was not free to sell elsewhere; that if costs went up, the risk was Polaroid's whereas if costs were cut the gain was Polaroid's; that the patents were retained by Polaroid; that Polaroid could terminate without cause and that Greist might never make another camera. (R. A152.)

The Court of Appeals quoted the comments of the District Court and stated that "We agree that Polaroid is the manufacturer of the camera within the meaning of the statute for the reasons just quoted."

(Supp. Pet. 27.)[1] The Court of Appeals further stated that, even if it could be assumed that the relationship was one of buyer and seller, a transfer which conveyed no right to use or resell the camera, because the patent rights were already in the transferee, and which conveyed only the bare right of possession, was not a "sale" within the meaning of the statute.

ARGUMENT

This case involves the applicability of Section 3406 of the Internal Revenue Code of 1939 (*supra,* pp. 2–3), which imposes a tax of 10% "on the price for which sold" on cameras, "sold by the manufacturer, producer, or importer."

The tax is not one on manufacture as such, but on sales. The tax is to be paid by the manufacturer or producer, but "this requirement is intended to be no more than a comprehensive and convenient mode of reaching all first or initial sales * * *." *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 574. Accordingly, in determining who is the manufacturer, it is necessary to look at the sale. Manufacturers liable for the tax necessarily must be those who make sales.

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[1] By inadvertence this sentence in the opinion originally read that "We agree that Polaroid is not the manufacturer of the camera within the meaning of the statute for the reasons just quoted." By order dated October 11, 1956, the Court of Appeals corrected its opinion by striking out the word "not."

The taxpayer's original petition for certiorari was based upon the opinion in its original form. (Pet. 3, 7, 10, 11, 14; Motion for leave to file supplemental petition 1–2.) This brief is directed to the arguments made in taxpayer's supplemental petition for certiorari.

In the present case it is clear that either the taxpayer or Greist is the manufacturer under this statutory provision. Both of the courts below, after a careful appraisal of the fact situation, concluded that the relationship between the parties was not that of buyer and seller and that the taxpayer was the manufacturer, having employed Greist to do the work for it.

Taxpayer's basic argument (Supp. Pet. 13–15) is that the one who fabricates an article is necessarily the manufacturer. But, as this Court pointed out in *Carbon Steel Co.* v. *Lewellyn,* 251 U. S. 501, 506, it is contemplated that a person manufacturing would use "other aid and instrumentalities." Or, as the Circuit Court for the District of California stated, in *Hendy* v. *Soule,* 11 Fed. Cas. 1097, 1099:

> To be engaged in the manufacture of machines, it is not necessary that a person should make them with his own hands, or that the work should progress under his personal inspection.

The taxpayer there paid the fabricators for the machines. Nevertheless, in holding that the taxpayer was the manufacturer who made the taxable sale, the court said that "The persons who constructed these machines for the plaintiff, did not manufacture them for sale, or sell them—they simply made them as workmen for wages or hire."

Warner-Patterson Co. v. *United States,* 68 C. Cls. 237, 243, involved a situation comparable to that presented by the present case. There the taxpayer held exclusive licenses on certain lenses useful for automobile lights. It paid three different factories

for making these lenses. The court stated that "For all practical purposes the three companies occupied the position of plaintiff's factories for the production of the lenses," basing its decision on the fact of the taxpayer's control of the patent. The later decision of the Court of Claims, *Hall-Scott Motor Car Co.* v. *United States,* 3 F. Supp. 818, 825, relied upon by taxpayer as being in conflict with the decision below (Supp. Pet. 20–22), did not purport to modify or overrule the *Warner-Patterson Co.* case; indeed, the question here in issue was not litigated in that case, where the Bureau of Internal Revenue had determined that the fabricator was the manufacturer liable for the tax, and where the only question at issue related to the amount of the sale price.

The decision below accords with the practical realities of the situation. An inventor who has no plant of his own but wishes to exploit his invention through having it made up for him, does not intend to buy and resell his product. So here, the taxpayer did not intend to buy cameras from a manufacturer, but looked for and found a skilled workman, the Greist company, and told it how many cameras to make. All the risks of the enterprise were assumed by the taxpayer.

Similarily, from Greist's point of view, it was performing skilled labor for the taxpayer. It did not undertake any of the risks of a manufacturer. Under the agreement here it is solely the taxpayer's instrumentality. If Greist had attempted to act on its own it could have been enjoined from any use or sale of

the patented cameras. In holding that the fact that Greist was not free to sell elsewhere is evidence that Greist was not a manufacturer who was making taxable sales, the decision below is in accord with *Charles Peckat Mfg. Co.* v. *Jarecki,* 196 F. 2d 849 (C. A. 7th).

As an additional ground for its decision, the court below observed that a transfer such as Greist made to taxpayer could not be deemed a "sale" within the meaning of the statute. (Supp. Pet. 27–28.) The camera here is one which produces a finished positive print within one minute after snapping of the shutter, and the patents cover the camera itself and the process which takes place within the camera when films are developed. (R. A87.) Ordinarily the sale of a patented article carries with it an implied license to use the article for the purpose for which it is designed. But the agreement specifically stated that Greist had no license under any of taxpayer's patents, except to deliver cameras (¶VIII (A), R. A134). Not until the physical assemblages of materials came into the possession of taxpayer could they be sold or used as cameras. Prior to that time, there could not have been a sale of cameras since Griest had no rights in the process.

A different situation arises in the case of unpatented products, as in *Charles Marchand Co.* v. *Higgins,* 124 F. 2d 433 (C. A. 2d), and *Williams* v. *Harrison,* 110 F. 2d 989 (C. A. 7th), cited by taxpayer. (Supp. Pet. 12.) In those cases the fabricator manufactured the product in question regularly, was free to sell to others, and did so. The sales in those cases

carried with them full rights of use, free of control by the taxpayers.

In the final analysis, this case presents no question concerning the meaning of the taxing statute. It involves at most the appraisal of the particular facts of a particular case. Both of the lower courts are agreed on this appraisal. Further review by this Court is not warranted.

CONCLUSION

The decision of the court below is correct and is in accord with the decisions of other courts and of this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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